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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 3

DOROTHY E. DAVIS, ET AL.,
Appellants,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR APPELLEES ON FURTHER REARGUMENT

T. JUSTIN MOORE
ARCHIBALD G. ROBERTSON
JOHN W. RIELY
T. JUSTIN MOORE, JR.
1003 Electric Building
Richmond 12, Virginia

Counsel for the Prince Edward County School Authorities

J. LINDSAY ALMOND, JR.
Attorney General
Supreme Court Building
Richmond, Virginia

HENRY T. WICKHAM
Special Assistant to the Attorney General
State-Planters Bank Building
Richmond, Virginia

For the Commonwealth of Virginia

HUNTON, WILLIAMS, GAY,
MOORE & POWELL
Of Counsel

Dated November 15, 1954.

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I.

INTRODUCTION

The decision of this Court of May 17, 1954, has raised over most of the Virginia scene the spectre of impending educational chaos. If this Court is now to order immediate amalgamation of the races in the public schools of Prince Edward County, the spectre becomes a reality; if this Court now permits a reasonable time for the problems raised by its decision to be weighed and for alternatives to be considered without the heat of emotion created by unreasonable haste, the children in Prince Edward may still go to school. It is for that reason that the school authorities of Prince Edward County, supported by the Commonwealth of Virginia, now appear before this Court.

We make clear at the beginning that Virginia has no plan or panacea that will result in complete solution of this problem. We do not foresee a complete solution at any future time. Government still derives its foundation from the consent of the governed. The people of many sections of Virginia have stated forthrightly that they will not consent to compulsory integration of the races in the public schools. Neither court decree nor executive order can force in those sections a result so basically opposed by a united majority.

A solution to the problems posed by this Court's opinion of May 17, 1954, is now being sought by a commission of members of the General Assembly of Virginia appointed by the Governor. It is now obtaining, through public hearings, advice from organizations and people in all walks of Virginia life for the purpose of formulating a legislative program. If that commission is permitted to seek an orderly

solution to the questions before it, it will find the way within the framework of the law.

This Court has the power to grant the time required to enable Virginia to work towards orderly solution. That is what we now ask.

II.

SUMMARY OF ARGUMENT

1.

The Power to Permit Gradual Adjustment

The order for further reargument of this case rather than swift reversal is evidence of the power of this Court to permit gradual adjustment. But beyond that, this case is in all essential respects an action in equity. There is a well recognized rule that a court of equity may create, withhold, delay or condition any remedy that it finds appropriate. That rule has been accepted in terms by this Court.

The rule has not only been accepted; it has been applied. In anti-trust litigation periods of years have been granted by the courts for compliance with divestment decrees. Similarly, equitable relief has been deferred or withheld in reorganizations and in other fields.

There is no reason why this general rule should not apply in this case. There are, on the other hand, compelling reasons why it should apply. In earlier school cases, where equality of facilities was at issue, time was customarily permitted for equalization. Those cases concerned enforcement of the same right as that of the Appellants, and the fact of present right does not encompass the right to immediate remedy. The power to permit gradual adjustment clearly exists.

2.

The Necessity for Gradual Adjustment

As the power to permit gradual adjustment so clearly exists, it is equally clear that the power should be exercised in this case.

A major factor where schools are involved is community attitudes. Without a favorable community attitude, no satisfactory adjustment is possible. An antagonistic attitude has already been evidenced in Prince Edward County and many other sections of Virginia. Time must be permitted to seek a solution.

Ratio of the races in a mixed community is important; it is where the percentage of the Negro is substantial that the problem is the most difficult. Ratios of Negro pupils vary by communities in Virginia from zero to 77.3%. Education now follows one pattern in the State; a plan for local variation must be devised. Time is needed for the preparation of such a plan; without such a plan, Virginia's schools may be closed.

Other factors, such as levels of public health, educational attainment and area residence must be taken into account in devising a new plan for public education. An integrated system will require more than time; it will require a complete change in the feelings of the people. Only if time that this Court may properly permit is given to devise a workable plan can public education continue to serve its object and purpose.

3.

The Final Decree

The difficulty with present preparation of a final decree in this Court lies in the fact that there is no evidence of record

on which a final decree could be based. The evidence of record relates primarily to the effect of segregation; the final decree must generally be based on evidence as to the effect of integration. None is now before the Court; without it a final decree would be based purely on conjecture.

Furthermore, it is not the purpose of an appellate court to frame detailed decrees. The Court has never done it before in school cases; it has generally refused the task in other cases. The mere fact that the Court seeks now a statement of the issues to be determined by a final decree points up the impossibility of its present preparation.

Reference to a master is equally fruitless. That would merely be a cumbersome and impractical method of obtaining the evidence necessary for framing the decree. But the general rule, applicable here, is that appellate courts do not receive additional evidence in cases in equity on appeal. Furthermore, reference to a master implies the formulation of an overall rule while it is probable that flexibility of remedy will prove important in these cases arising under such different circumstances. This Court is remote from the local scene; the court below, because of familiarity with local conditions, is much better qualified to establish the detailed result.

The proper solution is reversal and remand to the court below for further proceedings in accordance with very general instructions to enforce the decision of this Court while permitting the preservation of the local school system. In this regard, the court below should be permitted to allow such time as is reasonably necessary consistent with the preservation of the school system and local community attitudes.

III.

ARGUMENT

1.

The Power to Permit Gradual Adjustment

As directed by the Court,[1] we discuss in this brief only the fourth and fifth questions stated by the Court in its order of June 8, 1953.[2]

The fourth question is phrased in simple terms of judicial power; we will discuss it for the most part in that light with only occasional reference to the facts. The fifth and last question assumes that the Court will permit gradual adjustment of the races in the public schools of Prince Edward County and passes on to the question of the appropriate decree. Between the two lies the question whether and to what extent the Court should exercise the judicial power that it so clearly possesses to stay immediate enforcement of its decision of May 17, 1954. We touch briefly on that point and on the facts that make time important if schools are to survive.

We turn first to the fourth question. It asks:

> "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,
>
> (a) Would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
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> (b) May this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

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[1] 347 U. S. at 495.
[2] 345 U. S. at 972.

Merely to ask this question in the light of the history of this case is to find a substantial answer. If the Court had no power to permit gradual adjustment, it would simply have entered an order on May 17 reversing the decree of the court below with instructions to grant the relief sought. That the Court did not enter such an order is of itself evidence that it possesses the power to permit gradual adjustment.

Of course, the entry of such an order then as now would destroy the public schools of Prince Edward County. Even aside from this practical consequence, no such action is required because of the very nature of this proceeding. It is true that the Appellants sought a declaratory judgment, relief at law; but that was by no means their major purpose. Five of the paragraphs in the prayer for relief sought "a permanent injunction perpetually restraining and enjoining" the Appellees from doing something that the Appellants did not like. The action is therefore clearly brought in equity. And the powers of the chancellor to create, withhold, delay or condition the remedy as the situation may require cannot be denied:

> "Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties."[3]
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> * * *
>
> " . . . Courts of Equity . . . may adjust their decrees so as to meet most if not all of these exigencies; and

[3] 1 Pomeroy, *Equity Jurisprudence* (5th Ed. 1941) § 109.

they may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties."[4]

These principles so generally well recognized have been accepted in terms by this Court. It has said:

"The power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would otherwise be entitled, without condition, is undoubted. . . . It may prescribe the performance of conditions designed . . . to protect temporarily the public interest while its decree is being carried into effect."[5]

* * *

"Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."[6]

* * *

"It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief."[7]

* * *

". . . 'equity will administer such relief as the exigencies of the case demand at the close of the trial.' "[8]

This Court has not only accepted these principles; it has also applied them. The application has been particularly

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[4] 1 Story, *Equity Jurisprudence* (14th Ed. 1918) § 28.

[5] *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, 271 (1933).

[6] *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515, 552 (1937).

[7] *Eccles* v. *Peoples Bank*, 333 U. S. 426, 431 (1948).

[8] *Chapman* v. *Sheridan-Wyoming Coal Co., Inc.*, 338 U. S. 621, 630 (1950).

marked in the anti-trust field. It appeared in the early cases. In the famous *Standard Oil* litigation, this Court postponed for equitable reasons the operation of the decree:

> "We think that in view of the magnitude of the interests involved and their complexity that [*sic*] the delay of thirty days allowed for executing the decree was too short and should be extended so as to embrace a period of at least six months."[9]

The same rule has been followed more recently. In the *National Lead* case, the decree ordered the defendants to present to the court within one year from its date a plan for divestment of their interests in certain other corporations, the plan to be completed within two years from the date of the decree. On appeal, this Court held that:

> ". . . the decree shall be deemed, for the purposes of those paragraphs and for the running of time thereunder, to take effect on the effective date of the mandate to be issued by this Court."[1]

Again, in *Hartford-Empire Co.* v. *United States*, where some of the defendants were given two years to dispose of certain property, this Court said:

> "We are of opinion that a longer time should be allowed. . . ."[2]

And for compliance with another decree of divestiture a

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[9] *Standard Oil Co.* v. *United States*, 221 U. S. 1, 81 (1911).

[1] *United States* v. *National Lead Co.*, 332 U. S. 319, 333, 364 (1947).

[2] 323 U. S. 386, 426 (1945). See also the approval of a two year period in *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284 (N. D. Ohio 1949), modified 341 U. S. 593 (1951).

period of one year was approved.[3] The final decree in one of the largest of the motion picture anti-trust cases permitted a three year period for compliance.[4] In analogous proceedings under the Public Utility Holding Company Act of 1935, Congress itself permitted one year, subject to extension, for compliance with divestment orders.[5]

In the field of receiverships, so long conducted in equity before the arrival of the modern technique of corporate reorganization, equity not only postponed the enforcement of rights but often enjoined them permanently. The reorganization of the Seaboard Air Line Railway was in process almost sixteen years before it was completed.[6] One of the purposes of such receiverships was to prevent damage to the public interest through interruption of operations that might otherwise occur.[7]

This Court has suggested that a State court temporarily refrain from enforcing an equitable remedy until other action has been taken.[8] It has provided "a reasonable time" for corrective action before enforcing the injunctive remedy.[9] And the New Jersey Court of Chancery, respected widely in the field of equity, has given counsel time to estab-

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[3] *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944).

[4] *United States* v. *Loew's, Inc.*, CCH Trade Cases ¶62,573 (S. D. N. Y. 1950). Earlier stages of this case reached this Court. *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323 (S. D. N. Y. 1946), 70 F. Supp. 53 (1947), reversed 334 U. S. 131 (1948); 85 F. Supp. 881 (1949), affirmed 339 U. S. 974 (1950). *Cf. United States* v. *Aluminum Company of America*, 91 F. Supp. 333, 419 (S. D. N. Y. 1950), where "a liberal time period" for compliance was approved.

[5] 15 U. S. C. §79k(c).

[6] *Guaranty Trust Co.* v. *Seaboard Air Line Ry.*, 68 F. Supp. 304, 305, 306 (E. D. Va. 1946).

[7] *Re Metropolitan Railway Recievership*, 208 U. S. 90, 112 (1908).

[8] *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120 (1945).

[9] *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 239 (1907).

lish ways and means for compliance with a contract subject to specific enforcement.[1]

This general rule has, in the public interest, particular applicability when action by a State is required. As this Court has said:

> "A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion [to proceed to decision]."[2]

Here, as in the cited case, the legislature must act;[3] here, as there, the Court may properly give the legislature appropriate time to reach a decision.

These are some of many cases where courts of equity stay their hands in recognition of the fact that precipitate action may result in greater harm than no action at all. That is a rule of general acceptance. Are there special circumstances why it is inapplicable here?

We can find no reason for a different rule. The general rule was usually applied before May 17, 1954, in cases where equalization of school facilities was the point at issue. Chief Judge Parker made that clear in his opinion in one of the cases now before this Court:

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[1] *Mueller* v. *Kraeuter & Co., Inc.*, 131 N. J. Eq. 475, 25 A. 2d 874 (Ch. 1942).

[2] *Virginia* v. *West Virginia*, 222 U. S. 17, 19-20 (1911). To the same effect, see the further opinion in the same case, 241 U. S. 531, 532 (1916).

[3] The next regular session of Virginia's General Assembly will convene on January 11, 1956. Va. Const. (1902) § 46.

> "In directing that the school facilities afforded Negroes within the district be equalized promptly with those afforded white persons, we are giving plaintiffs all the relief that they can reasonably ask and the relief that is ordinarily granted in cases of this sort. See Carter v. County School Board of Arlington County, Virginia, 4 Cir., 182 F. 2d 531."[4]

Certainly there should not have been one rule generally applied in times past for equalization and a more stringent rule applied now. Nor can a different result be reached because of this Court's statement some years ago that the "rights" with which we are here concerned "are personal and present."[5] This Court has now made clear, in broad outline at least, the nature of the rights of the Appellants by its decision of May 17, 1954. We do not discuss here the nature of those rights; what is at issue here is the remedy to enforce those rights. Whether a present right leads to an immediate remedy, even if the right has a constitutional basis, remains a matter for the discretion of this Court in the light of all the circumstances.

This Court has without question the power to permit time for adjustment to new conditions which produce patent complexities.

2.

The Necessity for Gradual Adjustment

There is a hiatus between the fourth and fifth questions asked by the Court: the fourth question asks simply whether the Court has the power to permit gradual adjustment, while the fifth question assumes gradual adjustment. Between the two lies the question whether the Court should

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[4] *Briggs* v. *Elliott*, 98 F. Supp. 529, 537 (E. D. S. C. 1951).

[5] *Sweatt* v. *Painter*, 339 U. S. 629, 635 (1950).

exercise the power to permit gradual adjustment that it so clearly possesses. It is to that question that this section of our argument is addressed.

The discussion on this point must of necessity include mention, in very general terms, of facts of public knowledge. The evidence of record for both sides was addressed, except for certain material as to equality of facilities, exclusively to the matter of the constitutional effect of segregation itself. No one on either side considered the means for enforcement of a decision such as the one that has now been made by this Court. The evidence now required and not in the record is as to the effect of changing from a segregated system to one not based on color distinctions.

As this Court has recognized by its refusal simply to reverse and remand the decision of the court below, there are weighty considerations impelling the conclusion that action in this field must not be too hasty. A very recent and comprehensive study of school segregation takes into account as to the States outside the South a consideration that is equally applicable throughout the nation:

> "The most important factor in integration of the public schools in the non-South, finally, is community attitudes. It is axiomatic that separate schools can be merged only with great difficulty, if at all, when a great majority of the citizens who support them are actively opposed to the move. No other public activity is so closely identified with local mores. Interest in the schools is universal, and it is an interest that directly involves not only the tax-payer but his family, and therefore his emotions. Those who are indifferent to all other community affairs tend to take a proprietary interest in the schools their children attend, or will attend, or have attended. State influence in public education has grown in recent years in proportion to the increase in state aid, but state policies rarely are so

important as local forces in the shaping of public educational policies and practices."[6]

The truth of this statement is widely recognized. An antagonistic community attitude will result in open conflict beneficial neither to the schools nor to the children. This was first reflected in the public press after May 17, 1954, by occurrences in places as peripheral as Milford, Delaware, and White Sulphur Springs, West Virginia. After that, disorder spread to Baltimore and the District of Columbia, areas of metropolitan size and larger Negro population. No conflict has arisen in the South where segregation remains the rule, but what may well be in store in those central areas where there is greater Negro concentration and more united sentiment is not difficult to imagine.

The community attitude of Prince Edward County, Virginia, has already been made clear. There is attached to this brief as Appendix A a resolution adopted on July 12, 1954, by the Board of Supervisors of the County. The Supervisors are not trained perhaps to legal niceties but they reflect in quite an accurate manner the community attitude of Prince Edward County.

This case concerns, of course, only Prince Edward County and any action taken by the Court will bind only Prince Edward County for its school officials are the only ones before the Court. But Virginia is naturally interested on a broader basis and any action taken here would have its impact on other Virginia communities. For that reason, we point out that the attitude expressed by the community of Prince Edward is identical with that of many other Virginia localities. More than thirty counties and cities, through their legislative or school bodies, have expressed this atti-

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[6]Ashmore, *The Negro and the Schools* (Chapel Hill 1954) 81 2.

tude by resolutions filed with the Governor of Virginia. A list of these is placed at the foot of Appendix A. All that this means is that, if this Court's opinion of May 17, 1954, is ever to be accepted by the people of many sections of Virginia, and it may never be, a substantial period for adjustment must be permitted by this Court. Without community acceptance, public education as we know it now will not survive in those localities.

This brings us to the second major problem in Virginia as a whole. Ratio of population is of great significance in the solution to segregation. The study quoted above is emphatic on this point:

> "The ratio of Negro to white population is not a final determinant of racial attitudes, but it is perhaps the most powerful single influence, for the practical results of desegregation depend heavily upon it. This, more than anything else, seems to account for the great variation in the degree of expressed concern in the South over the steadily rising status of the Negro in the last generation—which has led finally to the demand for admission to the white schools. The Upland South, for example, found little to alarm it in the Negro's successful legal battle for the ballot, for there his numbers are not sufficient to give him control of local politics. The whites in the Black Belt, however, have had to face the prospect of becoming members of a political minority and many of them are still resisting, although the only means left to them are extra-legal."[7]

The question of ratio of population has particular significance in Virginia. The percentage of Negro school children ranges from zero in Buchanan, Craig and Highland Counties to 77.3% in Charles City County. A map of Vir-

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[7] *Id.* at p. 128.

ginia showing the general relation is included in Appendix B and it is supported by a table giving the specific relation in all Virginia localities.

In general, education in Virginia has operated in the past pursuant to a single plan centrally controlled with regard to segregation of the races. It would be most unfortunate if the decision of this Court on May 17, 1954, affected adversely the schools in Craig County where there are no Negro pupils as well as those in Charles City County. So some plan for local variation must be devised. That is one of the purposes for the Governor's commission of which mention has already been made. But if no time is permitted for the establishment of such a plan, the majority in Virginia are so determined that it is possible that all of Virginia's public schools will be closed for the period required to establish a new system, a period perhaps of years.

In the preparation of any plan, there are many other factors for consideration. The Court implies in its questions that the geographic location of residence is alone significant. But this seems perhaps an oversimplification. Is it not relevant to consider the general level of educational capacity and attainment between the two races? Should not general standards of health and morals be considered? What of the teacher force? If white parents and children are opposed to Negro teachers, should not some plan be worked out to minimize dissension and yet be fair to the Negro teachers? These are only a few of the many problems for consideration in the development of a new educational system. The blueprint for that system requires investigation of facts, study and resolution; all is now under way; time is required for decision.

The problem facing Virginia is a difficult one. It is the problem of coping with the decision of May 17, 1954. How best can Virginia coordinate that ruling with the

feeling of a majority of her people and the requirement that her children be educated? That is the basic problem under consideration. To reach the proper answer requires time. Even a generation may not be long enough for solution, but to find the beginning of the path to solution requires a substantial period of adjustment.

These in broad outline are the reasons why, in our view, this Court should permit a gradual adjustment. Otherwise, it may well drive Virginia's children from her schools.

3.

The Final Decree

In this background, we come to the fifth and last of the Court's questions:

> "5. On the assumption on which Questions 4(a) and (b) are based, and asuming further that this Court will exercise its equity powers to the end described in Question 4(b)
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> (a) Should this Court formulate detailed decrees in these cases;
>
> (b) If so, what specific issues should the decrees reach;
>
> (c) Should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
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> (d) Should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

We take up this question part by part.

A.

Detailed Decree by This Court

There is in our opinion one overwhelming reason why this Court should not formulate a detailed decree in this case. That is because the record at this time contains no evidence at all as to the facts on which such a decree should be based.

At the risk of repetition, we point out again that the facts of record relate only to the effect of *segregation;* what any detailed decree now entered must be based on is evidence as to the effect of *integration.* They are very different facts; they require very different expert testimony to determine. What now becomes important is evidence of community attitudes, public health, standards of educational capacity and achievement and many other matters. But none of this evidence is now of record. Without it, any detailed decree now made by this Court would be based either on preconceived notions of fact or on offers of proof by counsel.

Neither of these bases affords a satisfactory approach to the solution of so difficult a problem. It is inconceivable that an uninformed solution will be a satisfactory one. Yet any detailed decree now formulated by the Court would be based only on a lack of knowledge of the facts required for decision.

This is the principal reason why this Court should not now formulate a detailed decree in this case. It has never done so before with regard to schools. In three of the recent school cases, the court below was directed to take further "proceedings not inconsistent with" the opinion of this Court;[8] in the fourth case, the judgment below was simply

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[8] *Missouri* ex rel. *Gaines* v. *Canada*, 305 U. S. 337, 352 (1938); *Sipuel* v. *Board of Regents*, 332 U. S. 631, 633 (1948); *Sweatt* v. *Painter*, 339 U. S. 629, 636 (1950).

reversed.[9] These cases are apt precedents for those now before this Court in this regard.

From a broader viewpoint, this Court has properly shunned the task of preparing detailed decrees where other courts are available to assume that task. This Court has said:

> "The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case."[1]
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> * * *
>
> ". . . in order to prevent any complication and to clearly define the situation we think instead of affirming and modifying, our decree, in view of the broad nature of our conclusions, should be one of reversal and remanding with directions to the court below to enter a decree in conformity with this opinion and to take such further steps as may be necessary to fully carry out the directions which we have given."[2]
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> * * *
>
> "We would exceed our appellate functions were we to adopt that suggestion [to approve a specific form of relief] in this case."[3]

It is true, of course, that this Court has often modified decrees of lower courts in a specific manner. But that is something quite different from the construction of an entire decree in a complex case. What Mr. Justice Rutledge said in dissent in an anti-trust case is equally applicable here:

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[9] *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, 642 (1950).

[1] *International Salt Co., Inc.* v. *United States*, 332 U. S. 392, 400-1 (1947).

[2] *United States* v. *American Tobacco Co.*, 221 U. S. 106, 188 (1911).

[3] *Besser Manufacturing Co.* v. *United States*, 343 U. S. 444, 449 (1952).

> "Shortly, in my view it is not this Court's business to fashion or rewrite the decree. . . . The reasons which thus ordinarily restrict the scope of appellate review have magnified force in anti-trust proceedings. Their complex character usually requires, as in this case, months or years for the trial court's consideration. With its maximum attention, this Court cannot possibly attain the same detailed familiarity with the cause. Nor can it frame at long distance, with the same assurance, a decree adequate for the necessity.
>
> "The so-called equitable character of the proceeding does not nullify this inherent limitation upon appellate judicial action."[4]

There is no reason why this Court should depart from its established rule that the action to be taken here is that of reversal and remand with instructions for further proceedings. To formulate and enter a detailed decree now would be contrary to this practice established by many prior decisions. Furthermore, in the present status of the case, without evidence of facts and conditions relating to the circumstances to be encountered in the operation of the decree, that action by the Court is substantially impossible.

B.

Specific Details of a Present Decree

In view of our conviction that this Court should not now undertake to formulate a detailed decree, it would not be fruitful for us to discuss the specific issues to be reached by such a decree.

It appears, however, that the mere fact that this question was asked by the Court points up the difficulty of presently

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[4] *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 441 (1945).

framing a detailed decree. The Court is not now advised of the specific issues to be met and decided. Certainly where *what* is to be decided remains obscure, *how* to decide is even further remote. It does not seem too much to say that courts should not decide cases until they have been advised of the issues in question.

But in this case, even if the issues that the Court seeks were to be developed in the briefs of counsel on appeal, in itself a novelty, it might then be proposed that the Court proceed to decide those issues without a hearing, without evidence, without cross-examination, but only on assertions of fact, again made not by witnesses but by counsel, and on certain general notions of the propriety of things. We would not have considered this an acceptable program under any circumstances; we do not believe that the Court will undertake to follow it now.

On a record where issues have not been developed, we do not and, indeed, cannot suggest specific issues for consideration in the formulation of a detailed decree.

C.

Reference to a Master

We turn next to the question whether it would be proper to refer this case and its companions to a master to receive testimony as to issues to be faced in making the final decree. In our opinion, a reference of this character would be improper and would serve no useful purpose.

Masters, like auditors, are, in the words of Mr. Chief Justice Marshall, simply "agents or officers of the court."[5] Courts have:

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[5] *Field* v. *Holland*, 6 Cranch 8, 21 (1810).

> ". . . inherent power . . . to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."[6]

But all that this means is that the court may to a limited extent give to an officer appointed by it the power to exercise some of its powers. The court cannot, on the other hand, give to such an officer powers that the court does not itself possess.

This Court has often appointed special masters. But it has made such appointments, so far as we can find, only where its original jurisdiction has been invoked. In those cases (and particularly in cases between States) the masters have relieved the Court of the burdensome duty of hearing and sifting evidence. The master hears and finds; the Court reviews and decrees.

In those cases, the Court has the duty to receive evidence and make findings of fact. In this case, the Court has no power to receive evidence. Mr. Chief Justice Taney considered the question of the power of this Court to receive evidence on appeal. He said:

> "This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it for testimony to influence the judgment of this court sitting as an appellate tribunal. And, according to the practice of the Court of Chancery from its earliest history to the present time, no paper not before the court can be read on the hearing of an appeal. . . .
>
> "Indeed, if the established chancery practice had been otherwise, the Act of Congress of March 3d, 1803, expressly prohibits the introduction of new evidence, in

[6] *Ex parte Peterson*, 253 U. S. 300, 312 (1920).

> this court, on the hearing of an appeal from a circuit court, except in admiralty and prize causes."[7]

The rule so established is generally accepted. Courts of appeal do not go out to receive new evidence; that is simply beyond their function.

But we do not base our answer here on any rule of ritual, however forceful and of long standing. The appointment of a master can serve no really useful purpose. It would assume that all of these five cases are alike, that one plan, one set of rules, one pattern can be devised to solve a single question raised by each of them. There is the further implication that, in a legislative manner, the Court may enact these general regulations for application wherever segregation in the schools may be found.

The assumption is contrary to the facts as this Court has already recognized in its decision in this case by its reference to the "great variety of local conditions."[8] In Wilmington, Delaware, segregation no longer exists; this Court need not therefore bother with the establishment of rules for that case. The same is true in Topeka, Kansas, and in the District of Columbia where segregation will have disappeared almost before this Court's mandates can find their way to the District Courts. So no master and no pattern are needed for those cases.

The Court is left then to consider Prince Edward County, Virginia, and Clarendon County, South Carolina. There is no reason to assume that the proper decree for one of these counties will be proper for the other; in fact, we suggest the likelihood that different solutions will probably prove most appropriate. Furthermore, even if this Court should establish two patterns to fit those two counties, a dangerous prece-

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[7] *Russell* v. *Southard*, 12 How. 139, 159 (1851). The statute referred to is found in 2 Stat. 244 (1803). Although it was omitted in the recodification of the Judicial Code in 1948 (62 Stat. 992), that omission cannot be taken to result in a change of the rule.

[8] 347 U. S. at 495.

dent would be established. Lower courts would no doubt hesitate in other counties under different conditions to depart from precedents so augustly promulgated. The result would be a loss of the flexibility of remedy which is the hallmark of equity and which provides the greatest possibility of successful solution of this difficult question on an area-wide basis.

Finally, we suggest that many of the considerations relevant in regard to the present formulation of a detailed decree apply equally to the use of a master to reach the same result. Perhaps the chief of these is the remoteness of this Court from the scene where its decision is to be effective. The court below of necessity has much greater familiarity with local conditions than this Court has or can possibly acquire. This Court can and should prepare the frame; it should leave the details of design to the court below, where the duty lies to paint in the details within the framework established by this Court.

It will not assist to achieve the proper result in this case to refer it to a master to receive testimony and report.

D.

The Path for Future Action

This final part is three questions in one. To the first part, which is whether this case should be remanded to the court below for further action, our answer is in the unqualified affirmative. This is of necessity true since all other alternatives have been tried and found unacceptable.

It is our opinion that this Court should give the court below a broad field for effective operation and that it should include only general directions in its decree. One such direction has already been given: segregation in education

by race or color offends the Constitution of the United States. In comparison with that direction, all others lose most of their significance. But some are of importance.

First, the court below should be instructed that ample time may be allowed for that first direction of the court to be made fully effective. We do not believe that this Court should attempt to establish any specific limit of time. This Court cannot know (nor, in fact, do we) how long will be required, if the public school system is to be preserved, for the full operation of its new rule as to segregation by race or color. Conditions over which we have no control make it clear that a very substantial period of time will be required.

Next, the court below should be permitted to take into account the physical problems that will now arise. These include use of school buildings and transportation facilities. Time will be required to work out plans for the use of physical facilities.

The court below should then be authorized to take into account intangible factors that affect the solution of the problem. These include general levels of health, morals and educational capacity and attainment. Even more basically, that court must be permitted to consider the feelings of the children, their parents and their community. Are the Appellants so determined that segregated education be destroyed that they are willing to destroy all of education? That would indeed be a Pyrrhic victory. Leading authorities have emphasized the importance of community attitudes and events in outlying areas since May 17, 1954, have proved that, in fact, community attitudes may impede or frustrate amalgamation. It seems to us important that schools continue and more important that they continue than how they continue. If this Court requires the court below to disregard these factors, it is overlooking the realities of the situation.

Finally, the court below should be permitted to take into

account any other factor that may be presented by the parties. The commission appointed by the Governor of Virginia is engaged in receiving testimony as to facts existing in various sections of the State. Some of the facts developed may establish considerations now unknown relevant to Prince Edward County. The court below should not be tied down to any pattern.

Further procedure below, the third matter to be considered in this subdivision, should be made equally flexible. The court below should set a date on which it will hear evidence from the parties within the framework of this Court's opinions as to the provisions of its final decree. That court should be free to supervise future action in Prince Edward County to assure the enforcement of this Court's mandate as speedily as possible consistent with the maintenance of an effective system of public education in the County. Local officials should not be permitted to drag their feet, but they should not be asked to run so fast that destruction results. Education of public opinion will be required; officials should be permitted to lead for they cannot be driven.

The court below is fully equipped to carry out directions of this Court phrased in these terms. That is the best course of action for the Appellants and all those that they represent as well as for those like the Appellees who have opposed their basic views.

IV.

CONCLUSION

In conclusion, we reiterate that we know of no short path to solution of the problems raised by this Court's decision of May 17, 1954. No money judgment may be entered and

paid and the case then put aside to gather dust in the files. We anticipate continuing problems and, perhaps, prolonged social disorder; the generation of litigation foreseen with trepidation by some members of this Court will not be forestalled by any action now taken.

Our desire is to minimize any conflict that may now result and to preserve the public education of Virginia's children. We have outlined in this brief the best way in our opinion that the chances of achieving this aim may now be enhanced. We know that some of the alternatives that others will suggest will frustrate the achievement. The future is still cloudy and shows few signs of clearing; the path that we suggest seems to us the safest to follow in the difficult days that now lie ahead for our public education.

Dated November 15, 1954.

Respectfully submitted,

T. JUSTIN MOORE
ARCHIBALD G. ROBERTSON
JOHN W. RIELY
T. JUSTIN MOORE, JR.
1003 Electric Building
Richmond 12, Virginia
Counsel for the Prince Edward County School Authorities

HUNTON, WILLIAMS, GAY, MOORE & POWELL
Of Counsel

J. LINDSAY ALMOND, JR.
Attorney General
Supreme Court Building
Richmond, Virginia

HENRY T. WICKHAM
Special Assistant to the Attorney General
State-Planters Bank Building
Richmond, Virginia

For the Commonwealth of Virginia